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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 618

ALABAMA POWER COMPANY, *Petitioner*

v.

ALABAMA ELECTRIC COOPERATIVE, INC., a corporation; RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE; and ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ALABAMA ELECTRIC COOPERATIVE, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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This litigation, seeking to challenge a United States Government program administered by the Rural Electrification Administration, constitutes the latest in a long series of efforts by Alabama Power Company to imperil the stability and to stifle the growth of Alabama Electric Cooperative, Inc.

The loan from the United States to the Cooperative, which Alabama Power Company here seeks once more to attack, was approved by the REA Administrator in October 1961 (R. 224)—more than seven years ago. Since that time Alabama Power Company has endeavored to attack this REA loan before the Alabama Department of Finance, before the Alabama Supreme Court, on several occasions before the Congress,[1] and, finally, before the federal courts. In every instance Alabama Power Company's efforts have been unsuccessful and unpersuasive.

The reasons given in Alabama Power Company's petition for certiorari for still further prolonging this controversy are wholly lacking in substance. Their insufficiency to warrant a grant of certiorari is amply

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[1] See, in particular, the testimony of Alabama Power Company's president in Hearings before House Committee on Agriculture, on H.R. 10010, Food and Agriculture Act of 1962, Serial AA, Part 2, pp. 677-713, 87th Cong., 2nd Sess. (March 6, 1962), and in the following Hearings before Agriculture Subcommittee of the House Committee on Appropriations, on Department of Agriculture Appropriations: For 1963, Part 5, pp. 247-271, 87th Cong., 2nd Sess. (March 22, 1962); for 1964, Part 5, pp. 373-381, 88th Cong., 1st Sess. (April 2, 1963); for 1965, Part 5, pp. 295-311, 88th Cong., 2nd Sess. (April 9, 1964). On the Senate side, see also the testimony of Alabama Power Company's president in Hearings before Senate Committee on Agriculture and Forestry, on S. 2786, Food and Agriculture Act of 1962, pp. 660-694, 87th Cong., 2nd Sess. (February 28, 1962), and in the following Hearings before Agriculture Subcommittee of the Senate Committee on Appropriations, on Department of Agriculture Appropriations: For 1962, on H.R. 7444, pp. 902-906, 87th Cong., 1st Sess. (May 11, 1961); for 1963, on H.R. 12648, pp. 1047-1070, 87th Cong., 2nd Sess. (March 1, 1962); for 1964, on H.R. 6754 (Rural Electrification Administration), pp. 135-142, 244-246, 330-332, 88th Cong., 1st Sess. (April 4, 1963); for 1965, on H.R. 11202, Vol. II, pp. 247-282, 88th Cong., 2nd Sess. (June 30, 1964).

demonstrated by the Government's brief in opposition. A few supplemental comments from the Cooperative may also be helpful to the Court.

1. There is no conflict of decisions, and petitioner's claims of conflict are spurious.

Petitioner asserts (Petition, pp. 24-30) a conflict with *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1. But this Court's opinion in *Hardin* shows on its face exactly the opposite. Footnote 7 in *Hardin* (390 U.S. at 7) expressly distinguishes, from the situation there considered, the line of decisions exemplified by *Kansas City Power & Light Company* v. *McKay*, 96 U.S. App. D.C. 273, 225 F.2d 924 (1955), certiorari denied, 350 U.S. 884, which held that under the REA legislation an alleged competitor claiming injury does not have standing in court to challenge an REA loan, and that the remedy, if any, is with Congress rather than the courts. Thus *Hardin* itself explicitly recognizes that the *Kansas City* doctrine was left wholly intact, and that if petitioner feels that the REA Administrator exceeded his statutory authority by making this Government loan and by insisting on 35-year all-requirements contracts to provide adequate security for the United States, then petitioner should address its complaint to Congress instead of the courts. Moreover, the question at issue in *Hardin* was a special territorial limitation imposed on the TVA by Congressional amendment of the TVA Act—legislation in no way involved here. The Court found (390 U.S. at 6-7) in the legislative history of that TVA Act amendment a clear Congressional purpose to confer on private utilities the standing to protect themselves in court from TVA competition—again, circumstances

which are wholly absent here and which present a matter of statutory interpretation entirely different from what is involved in the well-established interpretation of the REA legislation.

Petitioner's other claims of conflict turn out to be even more remote and far-fetched. Thus the claim (Petition, pp. 20-24) of conflict with the District of Columbia Circuit's subsequent decision in *City of Paris* v. *Federal Power Commission,* — U.S. App. D.C. —, — F.2d —, Docket No. 21375, decided July 3, 1968, evaporates on inspection of that decision. *City of Paris* held that an REA-financed cooperative is not an "instrumentality" of the United States within the particular definition set forth in Section 201(f) of the Federal Power Act, 16 U.S.C. § 824(f), and accordingly that the "instrumentality" exemption in Section 201(f) would not by itself justify the Federal Power Commission's refusal to take jurisdiction when such a cooperative asks that the Commission direct an investor-owned utility to interconnnect with the cooperative so as to make possible a wheeling arrangement for delivering energy to one of the cooperative's customers. Obviously such definitions of terms as used in the Federal Power Act have not the slightest applicability to the present case. Moreover, the extent of Federal Power Commission jurisdiction over REA-financed cooperatives is a matter having its own complex background of legislative and administrative history—all discussed extensively by the District of Columbia Circuit both in *City of Paris* and in its earlier opinion in *Salt River Project Agr. Dist.* v. *Federal Power Comm.,* — U.S. App. D.C. —, 391 F.2d 470 (1968), certiorari denied sub nom. *Arkansas Valley G. & T., Inc.* v. *F.P.C.,* No. 184, October 14,

1968. Such questions, involving the scope of particular Federal Power Act provisions, do not arise directly in the present case, nor do they even bear any visible relationship to the issues here. Indeed, in *City of Paris* (slip opinion, p. 6) the District of Columbia Circuit went out of its way to point out—what must in any event be obvious—that "while an entity may be considered a government instrumentality for certain purposes, it need not be so considered for all purposes", and that "We hold here simply that East Kentucky, as an REA-financed cooperative, is not a government instrumentality for purposes of the Section 201(f) exemption in the Federal Power Act."

Finally, petitioner's claim (Petition, p. 31) of conflict with *Harman* v. *Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964), and *Bankers Life and Casualty Company* v. *Larson*, 257 F.2d 377 (5th Cir. 1958), certiorari denied, 358 U.S. 879, is entirely wide of the mark. *Bankers Life*, being an earlier decision of the Fifth Circuit, would not give rise to a conflict of circuits even if it were incompatible with the Fifth Circuit's decision here. But in fact there is no inconsistency at all; in *Bankers Life* the Fifth Circuit merely held that a state insurance commissioner was not immune in a civil suit under the federal antitrust laws if his acts, instead of being acts for the purpose of carrying out his official duties under state law, were personal acts done as a part of a conspiracy against the plaintiff (257 F.2d at 380-381). In *Harman* the Ninth Circuit made it clear that the allegation in the complaint that the other defendants sought to influence the state attorney general was but one element in a larger long-continued conspiracy sufficiently alleged in the complaint, and hence that the complaint had

sufficient other allegations to state a cause of action (339 F.2d at 566). Neither *Bankers Life* nor *Harman*, moreover, involved efforts to use the federal antitrust laws as a vehicle for challenging United States Government programs. Nor did they involve any question, as here, of interpreting the antitrust laws in a manner which would make them harmonious with other federal statutes such as the REA legislation.

2. Thus petitioner's claim of conflict of decisions collapses. But more than that, petitioner has not shown that pending litigation exists in any other federal court of appeals—or for that matter, even in any other federal district court—which involves the same or a similar question.

3. In any event, the decision below is in full accord with principles expressed in decisions of this Court. E.g., *Eastern R. Conf.* v. *Noerr Motors*, 365 U.S. 127, 136-137; *Mine Workers* v. *Pennington*, 381 U.S. 657, 671-672; *Parker* v. *Brown*, 317 U.S. 341, 350-352; see also *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Auth.*, 362 F.2d 52, 55-56 (1st Cir. 1966), certiorari denied, 385 U.S. 947. The 35-year contracts which REA required the Cooperative to obtain in order to provide the United States adequate security for this loan (R. 226-227)—which are the contracts petitioner complains of—are the clearest embodiment of the kind of "governmental action" which such decisions have consistently held not to be within the scope of the prohibitions of the federal antitrust laws.

4. The REA's insistence on such 35-year all-requirements contracts in connection with REA loans to cooperatives for generating facilities not only has been a matter of common knowledge; it has been expressly

brought to the attention of Congress, first by REA itself [2] and then by REA's critics such as petitioner.[3] And having received detailed knowledge on the subject, Congress from year to year continued to appropriate loan funds to REA without restrictions in this respect. On a number of occasions Congress also has rejected proposals either to limit REA's authority with respect to generation loans or to subject the REA Administrator's loan-approval discretion to a review by the Federal Power Commission or by others.[4]

Moreover, in connection with 1964 appropriations, the Appropriations Committees of both Houses made an extensive examination of the REA generation and transmission loan program, as a result of which the Committees suggested detailed procedural changes in REA's processing of loan applications.[5] It is noteworthy that none of those suggestions contained the slightest indication of Congressional dissatisfaction with the REA's imposition of 35-year all-requirements contracts.

5. The Fifth Circuit's decision here is soundly rooted in the express provisions of the Rural Electrification Act and its legislative history, in the distinctive character of the Federal Government's rural elec-

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[2] See, for example, Hearings before Agriculture Subcommittee, Department of Agriculture Appropriations for 1951, Senate Committee on Appropriations, 81st Cong., 2d Sess., pp. 1409-1413.

[3] See note 1, supra.

[4] See, for example, 92 Cong. Rec. 1799-1817 (1946); 92 Cong. Rec. 1571 (1946); 93 Cong. Rec. 2423 (1947); and, for certain of the more recent proposals, see the materials cited in note 1, supra.

[5] H. Report No. 355 and S. Report No. 497, 88th Cong., 1st Sess. (1963).

trification program and of the REA borrowers, and in the particular economics of the REA-financed generation of electric power. It is well known that, from the outset of the REA program, the generation and transmission loans made by REA have been the subject of vigorous, hostile attacks by investor-owned power companies. If the 35-year contracts imposed by REA were to be held subject to question under the federal antitrust laws, then the cooperatives would face the prospect of treble-damage suits and other extensive litigation from investor-owned utilities anxious to impede the REA program. Defense of such litigation would alone be a heavy burden for these cooperatives. Indeed, the ability to harass the cooperatives by long-drawn-out pretrial, trial and appellate proceedings would by itself present virtually irresistible attractions, no matter how lacking in merit the case might be. Such litigation would impede and disrupt the sound operations of the cooperatives and seriously set back the federal rural electrification program—a result exactly the opposite of what Congress intended.

Illustrative are some of the facts which are in the background of this case. They underscore even further the otherwise compelling reasons for denying certiorari.

In Alabama there are two utility systems (apart from the TVA) engaged in generating and transmitting electric energy. The first, Alabama Power Company, is a subsidiary of The Southern Company (a registered holding company) and an integral part of The Southern Company System. The second, Alabama Electric Cooperative, is an REA-financed cooperative obtaining its principal capital funds by loans

from the United States and carrying on its activities in accordance with the numerous requirements which REA imposes on it.

Alabama Power Company is many, many times larger than Alabama Electric Cooperative. For example, in 1964 Alabama Power Company had a maximum system demand of over 2.8 million kilowatts, and sold over 13 billion kilowatt hours, bringing in revenues of over $156,000,000; and at the end of 1964 it had a total electric plant investment of over $825,000,000, plus its $74,000,000 one-half interest in Southern Electric Generating Company.[6] It also conducts vast annual construction programs.[7] Alabama Electric Cooperative, on the other hand, in 1964 had a maximum demand of only 79 thousand kilowatts and sold only about 378 million kilowatt hours, bringing in electric energy revenues of only about $3,100,000; and at the end of 1964 it had a total electric plant investment of just under $19,000,000.

Despite this tremendous disparity in size, and despite the fact that its efforts to challenge this REA loan to the Cooperative have been rebuffed in one forum after another, Alabama Power Company did manage to prevent any of the REA loan funds from being received by the Cooperative for a period of nearly five years. At first it was able to do this by the

[6] Such statistical data, as well as the comparable data for Alabama Electric Cooperative, are readily available from the annual report forms which constitute public records of the Federal Power Commission. See also R. 230-231.

[7] Thus in a recent filing with the Securities and Exchange Commission, Alabama Power Company stated that its 1968 construction program is estimated at $83,951,000. SEC Holding Company Act Release No. 16168, dated September 19, 1968.

voluminous and time-consuming nature (R. 78-80) of the challenge which it sought to make to the REA loan in hearings before the Alabama Department of Finance (which under Alabama law was required to approve the Cooperative's issuance of any notes to the United States for the REA loan funds). When the Department of Finance granted such approval on January 9, 1963 (R. 80), Alabama Power Company thereupon took the matter to the state courts and obtained a "temporary" restraining order. The Alabama Supreme Court decision against Alabama Power Company was rendered on September 10, 1964; Alabama Power Company's first application for rehearing was denied by the Alabama Supreme Court on April 8, 1965 (R. 81-82). The following day, April 9, 1965, Alabama Power Company began the present federal court suit. Alabama Power Company also filed a second application for rehearing in the Alabama Supreme Court (R. 81), which was denied on June 30, 1965.[8] This event finally brought about the termination of the "temporary" restraining order so that the long-delayed REA loan to the Cooperative could at last proceed. But as the chronology shows, Alabama Power Company meanwhile had been able to accomplish a delay of nearly five years in the start-up of this Government-sponsored project.

This background provides a persuasive addendum to the already compelling reasons why this Court should end this litigation, once and for all, by denying certiorari.

The Court of Appeals wisely observed: "If the security which the Administrator requires can be un-

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[8] *Alabama Electric Cooperative* v. *Alabama Power Co., Inc.*, 278 Ala. 123, 176 So. 2d 483 (1965).

dercut and the borrower mulcted in treble damages for complying with the condition imposed by the Administrator for making the loan, then the functioning of the Act will be crippled, if not defeated" (394 F.2d at 677; Petition, p. 10a). Petitioner's undue prolongation of this controversy has already succeeded in bringing the matter much too far in such a direction. The time for this litigation to be terminated is now.

CONCLUSION

For the foregoing reasons, in addition to the reasons stated by the Government, the petition for certiorari should be denied.

Respectfully submitted,

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